No. 3078

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
as Trustee and Guardian of, and
ex rel SAM WILLIAMS,
Plaintiff in Error.

vs.

SEUFERT BROTHERS COMPANY
a corporation, and F. A. SEUFERT,
Defendants in Error.

In Error to The District Court of The United States for the District of Oregon.

BRIEF OF THE DEFENDANT IN ERROR

A. S. BENNETT,
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The Dalles Optimist Press

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STATEMENT OF CASE

This is a case brought by the United States in the Court below as alleged guardian of one, Sam Williams, a civilized Indian, to recover damages, UNDER THE STATE LAWS, for interference with his alleged prior fishing rights (under the laws of the State of Oregon) at a certain point on the OREGON SHORE, and for damages to his fish wheel, caused by his wheel drifting away in the swift current when unfastened by the defendant from the point in question.

The real point in controversy between the plaintiff and defendant, is the right to the possession of the point in question and the right to go upon the high land back of the point and fasten cables to hold the fish wheel in place in the current. The plaintiff does not claim IN THIS ACTION, any rights under the Yakima Indian Treaty, or any peculiar rights AS A YAKIMA INDIAN.

On the contrary, he alleges that he is a citizen of the United States and claims a right to fish at the

point in question UNDER A LICENSE FROM THE STATE OF OREGON, and by reason of an alleged priority, under the laws of said state.

The damages named in the complaint amount, as alleged, to $2180.77. Of this amount $1600.00 is claimed for interference with the alleged prior right to fish, and $580.77 for alleged damages to the wheel and appliances, caused by the current, when the wheel drifted away.

It is not pretended that Williams, as a matter of fact. ever associated himself with the Yakima tribe of Indians, or ever actually maintained or established any tribal relations with that tribe.

On the contrary, it is alleged in the complaint, that he is A CITIZEN OF THE UNITED STATES, residing in Oregon, and that he has RESIDED IN THAT STATE FOR 21 YEARS and HAS ADOPTED THE HABITS OF CIVILIZED LIFE, and has in fact, taken up a homestead in the State of Oregon.

Of course, it is entirely plain, that Sam Williams could not himself, have brought this action in the

Federal Courts, at all. Both because he is a citizen of Oregon—the same State as the defendants, and because the amount of $2180, sued for, is not sufficient to bring the case up to the limitations prescribed by Congress.

It is not directly alleged in the complaint, that Williams is a member of the Yakima tribe, but it is alleged that he holds a trust allotment, on that reservation.

This, and the fact that some of the proceeds of the sale of a part of that allotment, were invested by Williams, in the fishwheel in question, are the sole facts upon which the right of the government to bring this action in the Federal Court, are based.

The only question in the case therefore is:—

Does the relation of guardian and ward exist between the United States Government, AND A CIVILIZED INDIAN, who has no affiliation with a

tribe and has never lived on its reservation, but has established a permanent residence in another state, and adopted the habits of civilized life, and gone into independent business for himself;—who dresses as a white man; lives as a white man, and has taken a white man's homestead—so as to make it the duty of the government, to bring an action in the Federal Courts, to litigate his claims, AS AN ORDINARY CITIZEN, UNDER THE STATE LAWS, of the State in which he lives; simply because he has been alloted land on a reservation, and still owns, a portion of that allotment?

The Court below held, that such an Indian, who had separated himself so entirely from the tribe in question for such a length of time and adopted the white man's habits of life, and established a permanent residence, separate from the tribe, in another state, had acquired under the act of Congress, a complete citizenship and that the relation of guardian and ward (for such a purpose) did not exist. This Court is asked by this writ to revise that decision.

HISTORY OF CASE.

It is well, perhaps to notice the history of this case as developed herein and in the previous case between the same parties, alluded to in the brief of Plaintiff in Error and reported in 233 Fed. 579.

The real controversy, between Williams and the Seufert Brothers Company, as we have already stated, is over the superior fishing right at a certain point on the Columbia River above The Dalles, and THE RIGHT TO THE USE OF THE HIGH BANK BACK OF THE POINT, FOR THE PURPOSE OF FASTENING SHORE LINES AND HOLDING A STATIONARY FISH WHEEL AGAINST THE SWIFT CURRENT, at the point.

EVERY QUESTION INVOLVED IN THIS CASE WAS BEFORE THE COURT AND PASSED UPON IN THE PREVIOUS CASE (233 Fed. 579,) WHICH IS NOW PENDING IN THE SUPREME COURT, BOTH PARTIES HAVING APPEALED IN THAT CASE.

That case was brought by the Government as guardian and on behalf of Sam Williams as an al-

leged YAKIMA INDIAN, claiming rights under the Yakima Indian treaty. The complaint was finally amended so as to bring in the rights of the Yakima Indian tribe. The Court held with the tribe, as to its rights to fish on the South or Oregon side of the Columbia River, but held against Williams, on the ground that he was not a ward of the Government for the purpose of bringing such an action.

It is apparant that the question in that case, is the identical question involved here. This will clearly appear from the consideration of the opinion of Judge Wolverton in the former case (233 Fed. 579) and the opinion in this case (Abstract P 10-12). As we have said, both parties appealed to the Supreme Court, in the firstcase—Seufert Brothers Company from that part adjudging the rights of the Yakima Indians to fish on the south side of the river, and the government from that portion, holding that Williams was not a ward of the Government; and these questions have not yet been decided by the supreme Court.

At the time this action was brought in the Federal Court there was another suit pending in the State Circuit Court for Multnomah County, which was brought by Sam Williams, himself, to enforce his alleged rights in this same controversy. (This

is the suit alluded to in the brief of Plaintiff in Error P-33). That case is also now pending on appeal to the State Supreme Court. So that there is now pending three different suits in three different appellate courts, all brought by or on behalf of Sam Williams, against Seufert Brothers Company, to litigate the same identical rights and questions.

ARGUMENT

A number of the propositions urged in the brief of Plaintiff in Error and for which numerous authorities are cited, are not controverted in this case.

It may be conceded, that the position of guardian and ward, between the United States and the different Indian tribes generally exists.—That it rests with Congress in the first instance to sever (or authorize the severance) of that relation.—That Congress may sever or modify that relation, IN WHOLE OR IN PART.—That while that relation, for any particular purpose, continues to exist, the United States may maintain a suit or action to protect the Indian in relation to the particulars as to

which it is such guardian. These principals may be considered as established.

On the other hand, it is contended on behalf of the Defendant in Error, that Congress need not sever the relation of guardianship, by express words, or by direct action, AS TO EACH PARTICULAR INDIVIDUAL INDIAN, but that it may do so, by any general provisions, showing a fair implication of such intention.

It is further contended that Congress usually makes the severance of the relation of guardianship dependent upon some act condition or course of life, upon the part of that particular Indian. Often times (if not always) the test applied by Congress, is the BREAKING OFF OF TRIBAL RELATIONS. —THE ESTABLISHMENA OF A SEPARATE HOME, AND THE ADOPTION OF THE HABITS OF CIVILIZED LIFE.

In other words, we contend that Congress has said in terms, as plain as maybe,that when the In-

dian chooses, and is permitted by the Government, to separate from all Indian tribes and become a full citizen of a state, and establish a separate and independent home in that state, and engage in industrial pursuits and ADOPT THE HABITS OF CIVILIZED LIFE,—that the relations of guardian and ward are generally dissolved, although the Government may still interfere for certain purposes, as to protect trust allotments and possibly to prevent the sale of liquor.

To make the position of Defendant in Error more concrete, it is submitted that Congress HAS by repeated acts and declarations, shown an intention to encourage the individual Indian, to abandon his nomadic tribal life and to establish a separate home and adopt the habits of civilized life and enter upon the full relation of ordinary eitizcnship, and that when by the act of 1887, and the amendment of 1906 it provided, that,

> "Every Indian, * * * * who has voluntarily taken up his residence separate and apart from any tribe of Indians, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States and is entitled to all the rights, priveleges and immunities of such citizens."

That it thereby "put it up" to the Indian, to accept its terms if he would, and thereby, at least for most purposes, to dissolve his dependent relation and become a full, free and responsible citizen, with the

right to go into the State or other Courts on his own behalf.

It is to be observed, that the question involved, does not go to the POWER OF CONGRESS. No doubt Congress has the power, IF IT CHOOSE, to retain the guardianship of an Indian to the 100th generation—even although he becomes a full citizen, and goes out into the world, and engages in the mercantile or any other business, the same as any white man. But we insist that Congress has not manifested any such intention.

Neither is it a question of whether the department may act, for the purpose of protecting the Indian people from the sale of intoxicating liquor, or to protect its trust allotments.

Neither of these latter powers are here denied.

The question here is whether Congress INTENDS that the relation of guardian and ward shall continue FOR ORDINARY PURPOSES towards a civilized Indian who has separated from his tribe (if he ever belonged to it) for a long period of time. —Taken a white man's homestead in another state—gone into business there for himself—and adopted all the habits of civilized white men.

AUTHORITIES CITED BY PLAINTIFF IN ERROR NOT IN POINT.

It seems apparent that the numerous authorities cited by Plaintiff, do not reach this question and are not in point.

They are generally cases where the question involved was AS TO TRUST ALLOTMENTS, or as to the right of the government to PREVENT TRAFFIC WITH INDIANS IN INTOXICATING LIQUORS; and it was held that the Government had BY EXPRESS LEGISLATION, retained control in this regard, even when the Indian had been made, in other regards, a full citizen.

To the former of these two cases (allotment cases) belong the cases of

Tyer vs. West. Com. 221 U. S. 286-~~55 Fed. 748.~~

U. S. vs. Gray, 201 Fed. 291.

U. S. vs. Rechert 188 U. S. 432-~~47 Fed. 546.~~

To the latter (liquor cases) belong the cases of

Farrel vs. U. S. 110 Fed. 942.

U. S. vs. Perrill 232 U. S. 478-~~58 Fed. 694.~~

U. S. vs. Sandoval 231 U. S. 28-~~58 Fed. 107.~~

U. S. vs. 40 gallons of whiskey 108 U. S. 491-~~27 Fed. 484~~.

U. S. vs. Nice 241 U. S. 591-~~60 Fed. 194~~.

Much stress is placed by the learned attorney for the Plaintiff in Error, upon the case of U. S. vs. Nice.

But that case was a prosecution for SELLING LIQUOR TO AN INDIAN—a member of the Sioux tribe, and apparently living on the reservation.—There was nothing whatever to show that he had separated from his tribe or had adopted the habits of civilized life.

The question in that case was, whether the MERE FACT OF ALLOTMENT, completely absolved the tribal relation of an Indian who WAS STILL LIVING ON THE RESERVATION and still affiliating with the tribe, so that the Government could no longer regulate the sale of intoxicating liquors to such Indian.

The Court held that it did not, and, in that regard overruled the previous cases of U. S. vs. Heff 197 U. S. 488.

But the Court in the Nice case was not called

upon to, and did not pass upon the status of an Indian who HAD LEFT THE TRIBE PERMANENTLY AND ESTABLISHED A SEPARATE HOME AND ADOPTED THE HABITS OF CIVILIZED LIFE.

On the contrary, the decision was based upon the necessity of liquor regulation by the Government and upon the consideration of statutory provisions which obviously, have no bearing upon the case of an Indian, who has renounced his tribal affilations, and accepted the responsibilities of civilized life.

> THE COURT SAYS:—"The ultimate question then is whether Section 6 of th Act of 1887, was intended to dissolve the tribal rlations and terminate the National Guardianship *upon the making of the allotments,* and the issue of the trust patents. * * * * Upon examining *the whole Act,* as must be done it seems certain that. the dissolution of the tribal relation was in contemplation but was not to occur when the allotments were completed and the trust patents issued is made very plain. To illustrate, Section 5 expressly authorizes *negotiations with the tribe, either before or after the allotments* are completed, for the purchase of so much of the surplus lands, "as such tribe shall from time to time consent to sell" directs that the purchase money be held in the treasury "For the sole use of the tribe," and requires that the same shall be at all times subject to appropriation by Congress for the education and civilization of such tribes———or members thereof. *This provision for holding and using these proceeds like that withholding the title*

*to the allotted lands for 25 years * * makes strongly against the claim that the National Guardianship was to be presently terminated."*

Again—

"As pointing to a different intention, reliance is had upon the provision that when the allotments are completed the allottees 'shall have the benefit of and be subject to the laws both civil and criminal of the state' of their residence. *But what laws was this provision intended to embrace?* Was it *ALL* the laws of the State or only such as could be applied to tribal Indians consistently with the constitution and the legislation of Congress? * * * The Act made each allottee incapable, during the trust period, of making any lease or conveyance of the alloted land, or any contract touching the same, *and of course there was no intention that this should be affected by the laws of the State.*

"The Act also disclosed in an unmistakable way, that the education and civilization *of the allottees,* and their children, were to be under the direction of Congress, and plainly the laws of the Statewere not to have any bearing upon the execution of any direction Congress might give, *in this matter.*—The constitution invested Congress with power to regulate traffic in intoxicating liquors with the Indian tribes. * * * * And clearly there was no purpose to lay any obstacle in the way of enforcing *the existing congressional regulations upon this subject."*

Now, is it not plain, that these considerations, while very cogent, as to the question then under consideration by the Court, viz:—whether the issuing of a trust patent, absolutely dissolved all tribal relation—and whether the Government still retained such authority as to prohibit the sale of liquor, and to protect the trust property in which it retained an interest—have no pertinency as to the status and the rights of the Indian, when he has voluntarily BROKEN OFF ALL TRIBAL RELATIONS, and elected to live separately from the tribe, and adopted (as he was authorized to do by Congress) the separate individual life and habits of the white man.

Another thing, it is plain from the language quoted, "that it was within the contemplation of the Court, that the guardianship might be either PARTIALLY or WHOLLY released—might be retained for the salutory purpose of protecting against the sale of intoxicating liquors, or of protecting the trust property in which the Government still had a property interest."—While in all other respects the Indian might be, (as he clearly was) made subject to the laws of the state where he resided.

This conclusion is strengthened by the language of another paragraph of the decision, in which it is said:

> "Of course, when the Indians are prepared to exercise the priveleges and bear the burdens of one *sui Juris*, the tribal relation may be dissolved and the National Guardianship brought to

> an end, but it rests with Congress to determine when and how this shall be done and *whether the emancipation shall at first be complete or only partial.* Citizenship is not incompatible with tribal existence or continued guardianship and so may be conferred without *completely* emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection."

Now read in connection with this case the language of the same high Court in the case of United States vs. Waller 243 U. S. 452—which is, we believe, the very latest utterance of the Supreme Court upon this guardianship question.

In the latter case, the Indian in question was an ignorant mixed blood Indian. His title to his land had been made absolute by an act of Congress, but he retained his tribal relations, AND REMAINED UPON THE RESERVATION. The Indian was too ignorant to write his own name, and a white man, by apparently the grossest fraud, had taken advantage of his ignorance and secured a conveyance of the land. The Government undertook to commence a suit on his behalf in the Federal Court to set aside the fraudulent conveyance.

The question was whether by reason of his continued residence on the reservation under the charge of the agent, the Government could maintain a suit, as his guardian, to protect him IN THE MATTER OF THIS ALLOTMENT, the legal title to the same having been released to him by the Government.

The Supreme Court held, that the Government COULD NOT SUSTAIN AN ACTION AS GUARDIAN IN RELATION TO THIS LAND, ALTHOUGH IT MIGHT STILL BE HIS GUARDIAN FOR SOME OTHER PURPOSE, saying:

> "The tribal Indians are wards of the Government and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation, conferring citizenship, is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens, the relation of guardian and ward *for some purposes* may continue.
>
> "On the other hand, Congress may relieve the Indians from such guardianship and control *in whole or in part,* and may if it sees fit, clothe them with full rights and responsibilities concerning their property, or give to them a *partial emancipation,* if it thinks that course better for theif protection."

And again—

> "In the case now before us, *in whatever other respect,* the Government of the United States, *may continue to hold these Indians as wards,* needing and receiving protection from its authority over their persons and property.—As to the lands in question, the United States, in the passage of the Clapp amendment, evidenced its purpose to grant full power and control to the class named. As to them, the Government has no further interest in or control over the lands."

In the light of these decisions of the Supreme Court, the obvious question is, as to HOW FAR

CONGRESS INTENDED TO EMANICPATE INDIANS IN CASES OF THIS KIND.—viz: Indians who had PERMANENTLY SEPARATED FROM THEIR TRIBES AND ADOPTED CIVILIZED LIFE; when it provided in the Act of 1887 (reenacted in this regard in 1906,) that:—

> "Every Indian born within the Territorial limits of the United States, who has voluntarily taken up within said limits, his residence, separate and apart from any tribe of Indians, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled *to all the rights and priveleges and immunities of such citizens.*"

Certainly it must be conceded, that this law, conferred SOME DEGREE OF EMANCIPATION UPON THE INDIANS, who had thus accepted civilization—made some change in his dependent status. Otherwise this solemn and impressive annunciation of Indian rights by Congress, were but idle words.

What then did Congress intend in this instance by conferring upon such Indians "ALL OF THE RIGHTS AND PRIVELEGES" of other citizens.

Unquestionably it seems that one of these priveleges was to go into and invoke the assistance of the State Courts, to protect their rights under the State Laws, as the learned attorneys for the Plain-

tiff admits in their brief. Sam Williams has actually done this in this case. That this right to invoke the protection of the State Laws, and go into the State Courts in his own behalf, was conferred by this act of Congress will hardly be denied.

Assuming then that such right, to go into the Courts on his own behalf, the same as any other citizen, was conferred, is it credible that Congress intended that there should be a DOUBLE ACTION, on behalf of every such civilized Indian. That he might proceed in the State Courts on his own behalf, and that the Government might, AT THE SAME TIME, proceed in his behalf in the Federal Court, to enforce the self same right; as was actually attempted in this case.

The conclusion that Congress had such an intent, is, we submit, impossible and unreasonable.

Much is made, in the brief of the Government, of the principle, that Congress is presumed to not have intended any radical departure from a settled and long continued policy.

But that principal of construction is not applic-

able here, for here these WAS NO DEPARTURE FROM SETTLED POLICY. On the contrary it has long (perhaps always) been the policy of the Government to encourage the Indians, to break off their tribal relations, and adopt the habits of civilized life—to make separate homes, and assume the duties and responsibilities of ordinary citizens.

U. S. vs. Celesture 215 U. S. 278.

It is urged that if Congress had intended to dissolve the relation of guardianship it would have done so by EXPRESS words—"The relation of guardian and ward is hereby abolished, etc."

But in view of the history of legislation upon this subject, this is hardly a reasonable argument. The relation of guardian and ward was not even CREATED OR DECLARED in the first place by express words. On the contrary it was IMPLIED from the general dealings with the Indians by Congress.

And, so it is thought, there has never been a case in which the relation of guardian and ward has been dissolved by express words, directed to that particular relation. And yet there are thousands of Indians in the United States, who's independent citizenship would not be doubted for a moment.

There were no such "express words" in the case of the Indian whose lands were involved in the U. S. vs. Waller, already cited, and yet the Supreme Court held that the relation, was dissolved.

No one questions and it is conceded in all the decisions, that the relation of guardian and ward, so far, at least, as the alloted land is concerned, will be dissolved, WHEN THE FINAL FEE PATENT IS ISSUED. And yet, this conclusion, IS ONLY REACHED BY IMPLICATION.

When Congress provided that any Indian who had "voluntarily taken up his residence, separate and apart from any tribe of Indians" and "has adopted the habits of civilized life," is "hereby declared to be a citizen of the United States, and is entitled to all the rights, priveleges and immunities of such citizens," It had expressed its intention with more than ordinary clearness, and unless there is something in the context or in concurrent legislation to limit that intention as in the matter of the prelim-

inary allotments in the Nice case—that intention ought to prevail.

As to this part of the section, applying to Indians who have VOLUNTARILY BROKEN OFF THEIR TRIBAL RELATION, there is absolutely nothing, either in the act itself, or in other concurrent legislation, which could modify the natural implication in a case like this, where there was no question of selling liquor and the trust lands in which the government had an interest, was in no way involved.

It is urged that the modification of the Act of 1887 by the Act of 1906, in relation to trust allotments, has an important bearing.

But it must be remembered, that the Act of 1906 DID NOT MODIFY OR CHANGE THAT PORTION OF THE LAW APPLYING TO INDIANS WHO HAD VOLUNTARILY SEVERED THEIR TRIBAL RELATIONS, IN THE SLIGHTEST, BUT ACTUALLY REENACTED THE SAME WORD FOR WORD.

Another significant thing, is that the Act of 1906 seems clearly intended to give the separation of the Indian from the tribe, etc, EXACTLY THE SAME EFFECT AS THE FINAL PATENT IN FEE.

Every Indian * * * to whom allotments shall have been made, and WHO HAS RECEIVED A PATENT IN FEE SIMPLE * * * * AND every Indian born, etc., who has voluntarily taken up his residence separate and apart from every tribe of Indians and has adopted the habits of civilized life, is hereby declared to be a citizen, etc.

Is it not plain then from the last enactment that Congress intended to place the Indian, who had adopted civilized life, in the same catagory with the one WHO HAD OBTAINED HIS FINAL PATENT IN FEE?

WILLIAMS SQUARELY WITHIN ACT

According to the allegations of the complaint, Williams comes squarely within the terms of the Act.

He has permanently left the reservation and has been living in the State of Oregon,—a different state from the one in which the tribal reservation is situated,—for 21 years, "and there has taken up his residence with his family and adopted the habits of civilized life." Complaint, Paragraph 2.

Not only this, but he has taken up a white man's homestead in the State of Oregon under the general laws of the United States.

It is not alleged, or as we understand it, even claimed that Williams has preserved his tribal affiliations (if he ever had any) or his tribal habits, on the contrary it is directly alleged that he has adopted the "HABITS OF CIVILIZED LIFE," and the habits of civilized life ARE NOT TRIBAL.

It is claimed, it is true, that his *allotment* made him a "Yakima Indian", but that is a mere conclusion of law, and even if he were, nominally, such an Indian the relation of guardian and ward for purposes like this would not follow U. S. vs. Waller, SUPRA.

Whether Congress still has retained power to regulate the education of the children of independent Indians likeWilliams, or the power to regulate the sale of liquor to them, etc., are questions, which do not seem necessary in any way to the decision in this case.

As was said by the Supreme Court in the Nice case, all the laws of Congress must be read together and in view of the laws against selling liquor to Indians, it may well be that. In that regard the Federal laws protect even a civilized and independent Indian like Williams. It may also be possible that it was the intention of Congress, that the children of such a civilized Indian, might be forced away from his home, against his will, to an Indian school on the reservation, (though this we doubt.)

No doubt the Government, in view of all the provisions, has still a right to protect the 40 acres of trust lands, which it still holds for Williams.

But this case belongs to none of these doubtful classes.

Here, there are no claims under AN INDIAN

TREATY. No question of the sale of liquor.—No peculiar INDIAN RIGHT of any kind involved.

On the contrary, the action is brought to maintain Williams' rights as an ordinary citizen, under the laws of the State of Oregon, and under a fishing license issued by that state.

EXPENDITURE OF MONEY RECEIVED FROM ALLOTMENT ON FISH WHEEL IMMATERIAL AND REMOTE

The claim that the use, by Sam Williams, of some portion of the money received from the sale of his allotment, in the building, or repair of his fish wheel, gave the Government a right to bring an action, for consequental damages to the wheel, and for damages for the loss of the opportunity to fish at a certain place in another state under the laws of that state; is too fanciful and remote, to merit serious consideration.

Whether or not the Government had a right to hold this money, from Williams, after the allotment was sold, it seems apparent, that after the Government had paid it over to him and permitted him to invest it in an independent enterprise, in another state, its interest and control over the same and over Williams in that regard must cease.

U. S. vs. Waller 243 U. S. 452.

In conclusion upon this branch of the case, we cannot epitomize our position in relation to the status of Sam Williams more forcibly than in the language of the learned Judge who wrote the opinion in the case below:—

> "He has dissociated himself from his tribe; has departed from the reservation of his adoption; has lived for 21 years among civilized people and off his reservation; has taken up civilized life and has entered a homestead as all citizens are entitled to do under the Act, and as said in the Williams case (233 Fed. 579), it is hardly possible to conceive a condition that would more completely impose upon him the status of a citizen and evidence a mere perfect waiver, of all dependance for affording him redress upon the Government, in the capacity of a guardian, of one acting under any legal disability."

WILLIAMS NEVER A YAKIMA INDIAN

So far the discussion of the case on the part of Defendant in Error has been based upon the theory that if Williams ever had been a Yakima Indian, he was no longer a ward of the Government for the purposes of an action like this, by reason of his separation from his tribe and the adoption of civilized life and the declaration of Congress in such cases.

The Court below based its decision upon this ground and did not decide the question, as to whethhe was a Yakima, (233 Fed. 587).

The question, is not, perhaps, now, necessary to a decision of this case. But we submit to the Court that Sam Williams never has been, really a Yakima Indian, in fact.

It will be noticed that the complaint does not allege directly that he ever was a member of that tribe. On the contrary the plaintiff in its complaint rests entirely upon the fact that he had an allotment on that reservation.

Notwithstanding this allotment, we contend that the facts alleged in the complaint, show that he never belonged properly to that tribe.

The allegation is that he

> "was born off the present Territorial limits of the Yakima Indian reservation, but within the boundaries of the present State of Washington.. *His mother was a member of the Cowlitz tribe of Indians,* and his father a member of the Yakima tribe. *He has lived for* 21 *years last past off the reservation and upon the south bank of the Columbia River in the State of Oregon.*"

It will be noticed that there is no allegation that he ever lived or affiiated with the Yakima tribe.

On the contrary the allegation is that for 21 years at least, he has had his residence in another state from that tribe.

As a matter of fact; as was developed in the first case, decided in the 233 Fed. 579, and as we think will be conceded here—his father was drowned on the lower Columbia (Cowlitz Country) when he was an infant, and he remained with his mother in that tribe until he was old enough to do for himself, when he

commenced fishing on the Columbia River, and worked, along up until finally he reached The Dalles where he permanently remained.

It is a historical fact, which has been frequently recognized by the Courts, that in Indian life and according to Indian customs, an Indian child living with the mother AND REARED IN HER TRIBE, belongs to her tribe, even although its father was of another tribe or even a white man.

U. S. vs. Hadley, 99 Fed. 438.

Higgins vs. U. S., 103 Fed. 352.

Indeed this naturally, if not necessarily, follows among a people of nomadic habits, where the marital relations were so indefinite, and oftentimes, temporary.

With such restless habits, it was impossible, in case of separation, for the father to care for an infant child, and naturally, such a child remained with the mother, and was raised by her amongst her own people.

Here, then, was a case, where the child was born in another tribe than the Yakimas—raised in that

other tribe, and affiliated with them as long as he affiliated with any tribe, at all. Until he went out for himself and made an independent home among white men.

He was not born a Yakima. He was not raised a Yakima. He never lived with the Yakima tribe, or adopted its customs or affiliated with its people.

Surely then he never became and never was a Yakima Indian IN FACT at all.

MERE ALLOTMENT DID NOT MAKE WILLIAMS A YAKIMA.

But it is contended that the action of the Indian department in making Williams an allottee on the reservation is CONCLUSIVE, upon the Courts, even in a matter like this, where the allotment is in no way involved. There was a time, when the acts of the department, were final as to the MERE RIGHT OF THE INDIAN TO AN ALLOTMENT. And this is the full extent and holding of the authorities cited by Plaintiff in Error.

There NEVER WAS A TIME, we submit, when the action of the department was controlling IN A

COLLATERAL MATTER, between different parties.

Any doctrine that the action of the department, in an allotment matter, between the Indian and the Government alone, in relation to the right to the land alone, could fix the status of the Indian as to other collateral matters, and his rights between him and other parties, who never had a chance to be heard in the allotment, at all, and who were not parties to that matter in any way; would be contrary to the elementary principle that "every man must have his day in Court." and would be monstrous in its effect.

U. S. vs. Hadley, 99 Fed. 437.

Dickson vs. Luck Land Co. 132 Minn. 396.

Dickson vs. Luck Land Co. 242 U. S. 371.

In the Hadley case cited above, the defendant was indicted in the Federal Court as AN INDIAN, for larceny on an Indian reservation.

The evidence developed that although he was AN ALLOTEE, LIVING UPON THE RESERVATION, yet, he was half white and had been BORN AND RAISED OFF THE RESERVATION and among white men. It was claimed, as in this case, that the action of the department, in treating him as an Indian, and alloting him land was decisive, as to his status.

The Court held that the status of a half breed, depended upon WHERE HE WAS BORN AND

RAISED, and that as this particular half breed, was born and raised OFF THE RESERVATION, he must be held, as a matter of fact, to be a white man, and not property belonging to the Indian tribe; although the defendant had accepted the allotment, and was at the time ACTUALLY LIVING ON THE RESERVATION.

Judge Hanford, who delivered the opinion, saying:

> "Whether the allotment was lawful or otherwise, is a question which cannot be determined in this proceeding, and I consider that it is immaterial because the action of the officers of the Indian department in making the allotment to him, could not deprive him of his birth right as the son of a white man."

In the case of Dickson vs. Luck Land Co. 132 Minn. 396, the parties to the action were claiming the land under separate and adverse deeds from the Indian in question, and it was claimed that the first of these deeds was made while the Indian was a minor, and was therefore void

The land in question HAD BEEN ALLOTTED AND PATENTED TO THE INDIAN BEFORE THE EXECUTION OF EITHER DEED.

Before the land could be alloted and patented to an Indian, THE DEPARTMENT HAD TO FIND, AS A MATTER OF FACT THAT THE INDIAN

WAS THEN OVER AGE. It was contended there, as here that the finding of the department was binding and conclusive, not only as to the direct matter of the Indians right to the allotment, but ALSO AS TO THE MATTER OF HIS AGE at the time of the allotment in the collateral trial, between the two claimants, under the Indians deeds.

It was held, that the finding of the department was in no way controlling in the collateral proceeding; the Court saying:

> "But there is no case holding that the finding of the Secretary of the Interior or the Land Department, that the Indian is an adult, settles this question, *for all purposes and for all times.* It settles is conclusively insofar as the right of the Indian to *take and hold title* is concerned, but the department has not attempted to adjudicate the capacity of the Indian to transfer his title."

This case was affirmed by the Supreme Court of the United States in the very recent case of Dickson Luck Land Co. 242 U. S. 371—61 T. Ed. 371. In which it is said:

> "Thus the question for decision, is whether the patent was to be taken as determining the allottee's age, for *any purpose other than that of fixing his right to receive the full title* free from any restrictions imposed by Congress. There is no mention of his age in the patent, and yet it must be taken as a finding that he was then an adult.
>
> "This is because every patent for Public or Indian lands, carries with it an implied affirma-

> tion, or finding of every fact made a prerequisite of its issue, and because the provision in the Act of 1907, made the majority of the allottee a prerequisite to the issue of this patent. But such implications, although appropriately and generally indulged in, in support of titles held under the Government patents *are not regarded as otherwise having any conclusive or controlling force.*".

And again

> "Although saying nothing on this point, it (the Act) evidently intends that the administrative officers, shall be satisfied in each instance before issuing the patent, that the allottee belongs to the particular class; and so the patent when issued, carries with it the implication that those officers found the allotment to be of that class. But the provision gives no warrant for thinking that this finding should have any greater effect or wider application, than is accorded to the findings implied from the issue of other patents."

In passing upon homestead applications, etc., it is always necessary that, the land department shall pass upon the citizenship of the applicant and find that he is a citizen of the United States. Would it not be foolish to suggest that, such finding would have any effect, in litigation between such claimant and other parties, where his citizenship became an issue.

We submit therefore to the Court that, the finding of the Indian department, while once conclusive, WHERE THE QUESTION WAS AS TO THE ALLOTMENT ITSELF, and the right thereto, never was controlling, in a collateral proceeding, between other parties and where the right to the allotment was not being litigated.

It is not very important here, since, as we have already seen, such findings of the Indian Department never were controlling in a collateral matter like this, but it is an interesting fact, in this connection, that such findings are NO LONGER CONTROLLING UPON THE COURTS, EVEN AS TO THE DIRECT MATTER OF THE INDIAN RIGHT TO AN ALLOTMENT.

The act of Congress approved December 21, 1911,—37 Statutes at Large P. 46—carried into the New Judicial Code of 1913, Section 24, Subdivision 24.—Gives the Courts jurisdiction—

> "of all actions, suits or proceedings involving the right of any person in whole on in part of Indian blood, to any allotment of land, etc."

and provides further that—

> "the judgment or decree of any such Court in favor of any claimant to an allotment of land,

shall have the same effect when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him."

Also see Hi-Yu vs. Smith 194 U. S. 401-48—Law Ed. 1041.

PROVISION IN APPROPRIATION ACT OF 1895, FOR THE APPEARANCE OF UNITED STATES DISTRICT ATTORNEY IN INDIAN CASES, NOT PERTINENT HERE.

The provision in this appropriation act, cited by Plaintiff in Error, obviously has no relevancy to this case.

In the first place, it has no reference to the bringing of an action AS GUARDIAN. It simply authorized the District Attorney to appear for an Indian in a suit pending, and applied as much, where the Indian was Defendant, as where he was Plaintiff, and probably as much in the State as in the Federal Courts. In many states, an attorney for the poor, is provided in much the same way.

This is clear from the context, which shows that it was a part of a provision CHEAPENING LITIGATION TO THE INDIANS. And it was clearly intended to have reference particularly to litigation in relation to land titles.

The whole subdivision is as follows:

> "To enable the Secretary of the Interior, in his discretion, to pay the legal costs, incurred by Indians in contests instituted BY OR AGAINST THEM, to any entry, filing or other claims, under the laws of Congress, relating to public lands, for any sufficient cause, affecting the legality or validity of the entry, filing or claim, Five Thousand Dollars; Provided, That the fees to be paid by and on behalf of the Indian party in any case, *shall be one half of the fees provided by law in such cases,* and said fees shall be paid by the Commissioner of Indian Affairs with the approval of the Secretary of the Interior, on an account stated by the proper land officers, through the commissioner of the general land office. In all States and Territories where there are reservations or allotted Indians, the United States District Attorney shall represent them in ALL suits at law and in equity."

It would indeed, be a strained construction of this act, to make it enlarge or affect in any way the relation of guardian and ward, between the Government and civilized Indians, or authorize the Government to bring an action in their behalf, simply because they lived upon a reservation, or had an allotment.

Indeed such a construction would be directly contrary to U. S. vs. Waller, Supra, because in that case the supposed ward was a RESERVATION INDIAN. But the Court held, that while he might still be a ward, for some purposes, it would not authorize the Government to bring a suit, in relation to property WHICH HAD PASSED INTO HIS INDEPENDENT OWNERSHIP.

ATTEMPT OF PLAINTIFF IN ERROR TO APPEAL TO SYMPATHY AND PREJUDICE.

The learned counsel for the Plaintiff in Error, have gone far outside of the record, to discuss the alleged apathy of the State authorities,—the alleged difficulty of an Indian securing justice in the State Courts,—the alleged prejudice against Indians and the alleged "rapacity" of white men in general and of Seufert Brothers Company in particular.

It is said that the State Fish Commission of Oregon, refused to interfere in Williams behalf,—That the Circuit Court for Multnomah County has found in his favor.—That the State authorities, because they have no power to ~~act~~, have no interest in Indian welfare and it is quoted at length what some Indian superintendent has SAID, that some prose-

cuting attorney IN THE STATE OF WASHINGTON, has TOLD HIM, to the effect, that "as the Indians do not pay taxes, he does not propose to put the County to any expense in prosecuting them, etc.

None of these things appear in the record, and if they did, they would be hardly pertinent, to the cold question of law, which is alone involved in this case.

What right has the attorney for the Government, to assume that the Oregon Board of Fish Commissioners, should have taken sides, and made themselves partisans, in a controversy between Sam Williams and Seufert Brothers Company as to the prior right to fasten his ropes upon the high bank in front of the company's land, or to assume that they should have decided in Williams favor, if they decided it at all.

It is not in the record, but, as a matter of fact, it will not be denied, that they issued licenses, covering the point, to BOTH the contending parties and left them to fight it out in the Courts on equal terms.

As to the alleged declaration of the District Attorney for YAKIMA COUNTY, WASHINGTON,

(assuming that it was made) what has that to do with this controversy between Sam Williams, an Indian CITIZEN OF OREGON, and a white man, also A CITIZEN OF OREGON, over property, situated in Oregon.

It may be that in Yakima County where there are large numbers of Indians who live on the reservation and pay no taxes, the authorities may feel it a burden, to protect them among themselves, on the reservation, at the expense of their white neighbors, in other parts of the county, who do pay the taxes.

Whether that is true or not, what has it to do with this controversy in Wasco County, Oregon, between an INDEPENDENT CIVILIZED CITIZEN, who has lived there for 21 years, and another citizen.

We do not suppose that any one will contend that Williams can go into business for himself and acquire personal property in his own right in Oregon, (even if some of the money received from his allotment is mixed in the investment) without paying taxes thereon.

It is argued, that Williams could not get Justice

in the State Courts; and yet the learned counsel goes outside of the record, to bring in the fact THAT WILLIAMS DID GO INTO THE STATE COURT IN THIS VERY MATTER and "PREVAILED ON ALL POINTS."

Brief of Plaintiff in Error, P. 33.

It is not stated in Plaintiff's brief, that that case is now on appeal, but if it were, it must be assumed that, if Williams is in the right, that high and unprejudiced tribunal, the Supreme Court of Oregon—will give him everything to which he is entitled.

As to the supposed general prejudice against an Indian; we submit there is, no longer, any such prejudice. No doubt, there was a time, in the early days, when there were constant conflicts between the Indians and the settlers, and when Indian cruelty in time of war—the cruelty of the tomahawk and the scalping knife—was fresh in the minds of the white race—when there was such a prejudice.

But that prejudice has long since passed and disappeared.

Every member of this honorable Court we believe, has lived—as the writer of this brief has—

among our western people, for years; and we submit, that nine-tenths of our white population, have now, no feeling towards the Indians, except that of sympathy and kindness, and a desire to see them prosper and advance.

The strongest evidence of this, indeed, is the liberality and generosity with which the Government (the people) has treated the Indian tribes.

Take this Yakima Indian reservation for instance. Everyone knows that it is the very best land in Eastern Washington or Oregon. An allotment upon it makes the allottee rich. HE IS FAR BETTER OFF THAN THE AVERAGE WHITE SETTLER.

And in addition to the land the white people provide him with horses and cattle and sheep—with plows and harrows and implements generally, and provide schools for his children, and all free from the taxes and burdens, which the white settler must bear. We submit, that in view of all these generous facts, the man who can, at this late day, talk about the present "rapacity" of the white man towards the Indians must be, indeed, either ignorant or thoughtless, of the real facts.

The brief of the Plaintiff in Error also charges, the Defendant, personally, with "rapacity." Saying on P. 37, that the statement in an opinion cited "is particularly applicable to the case at bar, even to the protection required from the 'rapacity and faithlessness' of the Defendant."

What is there in the record to show, that Mr. Seufert, (who is the manager and chief owner of the Defendant company) is either "rapacious" or "faithless".

There is an apparent controversy between Williams and Defendants, as to the prior and better right to this fishing place, and to the high ground behind it. As to this the Defendant is standing upon what it believes to be it rights.

We might go out of the record, as has been done by Plaintiff in Error, to testify that Mr. Seufert, is as fair and just a business man as there is in Wasco County, or in the State of Oregon. That he has never up to this time, been charged with unfairness or dishonesty. But it is enough to say, that these considerations one way or the other, are in no way involved in this case.

The question here is but a naked question of law.—

"IS THE GOVERNMENT THE GUARDIAN

OF A CIVILIZED INDIAN, WHO HAS SEPARATED FROM HIS TRIBE, RENOUNCED THE LIFE AND HABITS OF HIS PEOPLE, AND ADOPTED THOSE OF CIVILIZED LIFE; so as to justify the bringing of this suit?"

Respectfully submitted,

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